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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

~~IN RE:~~ JOHN B. SHUPPER,
Petitioner

v.

Committee on Character and Fitness of the Supreme Court of South Carolina

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF SOUTH CAROLINA

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the denial by the South Carolina Supreme Court and its Committee On Character and Fitness of petitioner's application to take the South Carolina bar examination without adequate notice, hearing and without any written reasons or basis, deprived him of due process and equal protection of laws as guaranteed by the fifth and fourteenth amendments.

II. Whether the decision below is in conflict with Willner v. Committee On Character and Fitness, 373 U.S. 96 (1963), which held that applicants for admission to the practice of law are entitled to procedural due process before a state can exclude them from the practice of law.

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OPINIONS BELOW

The order of the South Carolina Supreme Court on petitioner's petition is appended hereto at 1a.

The order of the South Carolina Supreme Court on petitioner's petition for rehearing is appended hereto at 2a.

JURISDICTION

The final decision of the South Carolina Supreme Court sought to be reviewed was entered August 18, 1982. This Court has jurisdiction to review the decision below pursuant to 28 U.S.C. §1257(3).

STATUTE INVOLVED

Rule 5A(2), Rules for the Examination and Admission of Persons to Practice Law in South Carolina is appended hereto at 5a.

STATEMENT OF THE CASE

This matter involves the application of petitioner to stand for the South Carolina bar examination. Petitioner, a 1982 graduate of the University of

South Carolina School of Law, filed on April 1, 1982 a timely application to take the July, 1982 bar examination.[1] Pursuant to South Carolina Supreme Court Rules for the Examination and Admission of Persons to Practice Law in South Carolina all applicants must submit an application and apply for examination and

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1. Petitioner submitted the standard ten (10) page application with twenty-three (23) attachments, including six (6) affidavits attesting to his good moral character and five (5) references. The petitioner also disclosed a nine (9) year old misdemeanor conviction for possession of drugs which had been set aside and expunged by court order. On October 16, 1973, petitioner was convicted of simple possession of hashish and LSD. The petitioner thereafter filed an application for post conviction relief. The State of South Carolina agreed that the verdict of the jury should be set aside and the South Carolina Supreme Court by order of September 24, 1975 so ordered. The Richland County Solicitor nolle prossed the case on January 1, 1977. By order dated August 31, 1977, the Richland County Court of General Sessions ordered the expungement of all records concerning the case.

admission to the practice of law. Such applications are referred to a five member Committee On Character and Fitness (hereinafter Committee) for the purpose of determining the fitness, character and qualifications of applicants.

On May 19, 1982, the Clerk of the South Carolina Supreme Court requested additional information concerning the 1973 arrest and petitioner promptly filed a written response by May 31, 1982. Petitioner was advised by the Clerk on June 9, 1982 that it would be "necessary for you to appear for a personal interview to discuss further the matters involving your 1973 arrest. . ."

Petitioner was given no further information about the interview. He was not told what standards the Committee would follow, nor anything about its procedures. He was given no information

about the Committee rules, for it has none.

Petitioner appeared without counsel before the Committee for his personal interview on June 17, 1982. At the interview, petitioner was questioned about his nine (9) year old arrest and misdemeanor conviction for simple possession of drugs. Petitioner documented that the conviction had been set aside on appeal, that a new trial had been ordered, that thereafter the solicitor nolle prossed the indictment, and that an order had been issued by the court ordering the expungement of all records concerning the case. Petitioner disclosed that he had served eight and one half (8½) months of his sentence in jail, and upon demonstrating satisfactory rehabilitation had been granted parole.[2]

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2. Petitioner successfully completed his parole in September, 1975 when his conviction was set aside by the state supreme court.

No other witnesses appeared and there is no indication that the Committee had before it then--or later--any information other than that provided by petitioner.

On July 14, 1982[3] petitioner was notified that the Committee had determined that he had "not established to the reasonable satisfaction of a majority of the Committee that you possess the qualifications for admission provided by Rule 5A(2)." 3a, 5a. Petitioner was provided no reasons for the denial of his application, only this citation to the good moral character rule.

Thereafter on July 22, 1982, petitioner filed a petition with the South

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3. Rule 6A of the Rules for the Examination and Admission of Persons to Practice Law in South Carolina provides that the Committee shall notify the clerk by July 1st for the July Examination whether or not the applicant possesses the necessary qualifications, and shall notify the applicant as soon as is practicable.

Carolina Supreme Court pursuant to Rule 6C seeking a review of the decision made by the Committee. Petitioner sought to have the Court set aside the decision of the Committee or at least be provided with reasons for the rejection of his application.[4] Neither the Committee nor anyone else filed any response to the petition for review.

By letter of August 2, 1982 the Clerk of the South Carolina Supreme Court notified petitioner that the Court had endorsed an order simply stating "Petition

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4. The petition included eight (8) additional affidavits attesting to petitioner's good, moral character and fitness to practice law. In fact, one (1) affidavit was from the arresting officer involved, six (6) affidavits were from practicing attorneys and the final affidavit was from a former employer of petitioner, the director of the Alston Wilkes Society, a statewide prisoner rehabilitation organization, attesting to petitioner's successful and complete rehabilitation.

Denied" 1a.

Pursuant to Rule 17 of the Court's Rules, petitioner, on August 11, 1982, filed a timely petition for rehearing with the South Carolina Supreme Court requesting a reconsideration of the earlier decision. The petition for rehearing alleged that petitioner's right to due process and equal protection of the laws as guaranteed by the fourteenth amendment were violated by the Court and its Committee in numerous respects, including the failure to have adequate standards and procedures, the denial of his application with no reasons whatsoever, and the denial of any meaningful notice and opportunity for review. Petitioner also alleged that if his application had been denied solely on the basis of his 1973 conviction, the reliance thereon, especially in light of the passage of time and his exemplary

conduct in the intervening nine years, further denied him due process and equal protection.[5]

No response to the petition for rehearing was filed.

On August 18, 1982, petitioner was advised by the Clerk of the Supreme Court that the following order had been entered by the South Carolina Supreme Court: "Petition Denied" 2a. To date, no reason or basis has ever been provided to the petitioner for the rejection of his application.

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5. The petition for rehearing also alleged that petitioner was subjected to disparate treatment from similarly situated persons, for misdemeanants, and particularly a person whose drug conviction was set aside because of an illegal search were admitted to the South Carolina bar.

REASONS FOR GRANTING THE WRIT

The writ of certiori should be granted because the decision below squarely conflicts with prior decisions of this Court. Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926); Morgan v. United States, 304 U.S. 1 (1938).

A state cannot exclude a person from the practice of law without due process of law.[6]

This case does not present the issue of whether or not a convicted misdemeanant can be excluded from the bar but whether the court can do so without providing due process of law as guaranteed by the Constitution. The issue involves whether a state can, consistent with the Consti-

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6. This Court has recognized as long ago as Ex Parte Garland, 4 Wall 333, 379 (1867) that the right is not "a matter of grace and favor."

tution, deprive a person of the right to practice law without any stated reason whatsoever.

A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the due process and equal protection clauses of the fourteenth amendment. Schware vs. Board of Bar Examiners, 353 U.S. 232, 238-239, (1957), Konigsberg vs. State Bar, 353 U.S. 252 (1957). As the Court stated in Schware,

> We need not enter into a discussion whether the practice of law is a 'right' or 'privilege.' Regardless of how the state's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the state's grace. Id. n.5.

The Court has consistently held that procedural due process requires notice,

hearing and opportunity to answer by the applicant. Goldsmith vs. Board of Tax Appeals, 270 U.S. 117 (1926). Procedural due process also requires confrontation and cross-examination. Greene vs. McElroy, 360 U.S. 474 (1959).

The decision below squarely contradicts this Court's decision in Willner vs. Committee on Character and Fitness, 373 U.S. 96 (1963). In Willner, the applicant had been certified by the State Board of Bar Examiners as having passed the bar examination in 1936 and the Committee in 1938 had determined that it was not satisfied and could not "certify that the applicant possesses the character and general fitness requisite for an attorney and counsel-at-law." 373 U.S. at 100. Even after several hearings and applications, Willner was still not provided reasons for the denial of his

application for certification. Willner alleged, inter alia, that he had been denied his constitutional rights in that in spite of his repeated attempts to ascertain the charges against him, he could not be sure of the Committee's reasons for refusing to certify him for admission. This Court citing Goldsmith determined that Willner had been denied procedural due process.

On all fours with Willner, petitioner here attended a hearing and was advised of the matter the Committee was considering. In Willner, this Court held:

> It does not appear from the record that either the Committee or the Appellate Division, at any stage in these proceedings, ever apprised petitioner of its reasons for failing to be convinced of his good character. Petitioner was clearly entitled to notice of and a hearing of the grounds for his rejection. . .
> 373 U.S. at 105.

The mere opportunity to provide evidence does not suffice, for this Court in Willner relied upon Morgan v. United States, 304 U.S. 1 (1938), a case in which two months of hearings resulted in a ten thousand page transcript, but not in due process.

> Those who are brought into contest with . . .Government in a quasijudicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. Morgan v. United States, 304 U.S. 1, 18-19 (1938).

Petitioner had no opportunity to ascertain and contest the basis of the Committee's reports to the Appellate Division, and the Appellate Division gave him no separate hearing. Yet, "[t]he requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps. Id. at 20. Willner v. Committee on Character and Fitness, supra, at 105.

Petitioner may surmise that the decision was based upon his drug conviction, but this is not at all certain. Question 17 of the bar application requires the applicant to list all violations of the law "except instances which have been expunged by order of the court. ." And the South Carolina Supreme Court has ruled that simple possession of marijuana is not a crime of moral turpitude. State v. Harvey, 268 S.E. 2d 587 (S.C. 1980).

The Committee and State Supreme Court might have considered, inter alia, his arrest, his misdemeanor conviction,[7] that he did not take the stand in his

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7. Subjecting him to disparate treatment, for if provided a hearing petitioner would show that others similarly situated have been admitted to the bar, including one whose marijuana/hashish possession conviction was reversed because of an illegal search. State v. Easterling, 257 S.C. 239, 185 S.E.2d 366 (S.C. 1971).

criminal trial,[8] that he spent time in jail, that he availed himself of state post-conviction remedies,[9] that they felt he was not rehabilitated, or that he did not file a previous provisional application because of the potential issue of his good character.[10]

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8. The transcript of the hearing is not numbered. Page cites are informal. Petitioner was asked:

> Why did you not take the stand? I understand you have a right not to take the stand. (T. 14)

9. Questioned about the setting aside of the conviction because of an invalid search warrant, petitioner was asked:

> The Supreme Court considered that on the original appeal, didn't they? (T.7)
> I don't understand how it can be raised on post-conviction relief. (T. 8-9).
> You basically got it [sic] off on a technicality. (T. 12).

10. Rule 6B allows an applicant who "has an important problem in regard to his character" to file a provisional application after entering law school. Petitioner was questioned:

> "Yet you felt you didn't need to comply with Rule 6B?" (T. 26).

The denial of petitioner's application might have been based on valid or invalid reasons, but it is a denial of due process to fail to inform him of the reason so that he may have a fair opportunity to contest the action against him. Cf. Middlesex County Ethics Committee v. Garden State Bar Association, ____U.S.___, 102 S.Ct. 2515 (1982).

The writ should issue because under prior decisions of this Court, petitioner being three times informed only that his application was denied, the state's procedures entirely failed to provide him with due process.

CONCLUSION

This entire proceeding has been distinguished by a total lack of procedural fairness to petitioner. All attempts to ascertain reasons for the denial of his application have been met with rejection. The State Carolina Supreme Court has rejected the petitioner's application, failed to provide adequate notice or hearing and determined that absolutely no reasons or basis need be provided an applicant who has been denied the right to take the state bar examination.

If a person can be prevented from becoming a member of the bar based on this record, there is essentially no constitutional restraint on how and for what reasons states may restrict access to the right to practice law.

For the foregoing reasons, this Court should grant a writ of certiorari to review the judgment below.

Respectfully submitted,

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